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IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

CRA-S-1981-SB-2003

Date of decision: 06.05.2024

Makhan Ram alias Kali

...Appellant

Versus

State of Haryana

...Respondent

CORAM: HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Mr. Rahul Vats, Advocate for the appellant.

HARPREET SINGH BRAR, J. (ORAL)

1. The instant appeal is preferred against the judgment of conviction and order of sentence dated 04.09.2003 passed by learned Additional Sessions Judge, Sirsa in the case stemming from FIR, bearing No. 84 dated 19.04.2002 registered at Police Station Sadar, Sirsa, under Sections 17 and 18 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act' for short), whereby the appellant was convicted and sentenced to undergo rigorous imprisonment for a period of two years with a fine of Rs. 20,000/- and in default of payment of fine, to further undergo rigorous imprisonment for a period of four months.

FACTUAL BACKGROUND

2. The facts of the prosecution case, tersely put, are that on 19.4.2002, A.S.I. Kamal Singh, Police Post Musahabwala, along with some police officials, was on patrolling duty near the bridge of Sukchain Distributory in village Panihari. The appellant-accused and co-accused (later acquitted) were seen coming towards that side while riding a bicycle. Upon seeing the police party, co-accused fled from

the spot. The appellant-accused, however, was apprehended by the police. He was



duly served with a notice under Section 50 of the NDPS Act, asking him as to whether he desired his search before a Magistrate or a gazetted officer. The appellant reposed his confidence in the investigating officer and allowed him to carry out the search. A search of the person of the appellant-accused revealed that he was carrying 520 grams of opium in a piece of cloth wrapped around his waist. Two samples weighing 10 grams each were drawn from the said contraband. Samples as well as the bulk parcels were seized by the police vide recovery memorandum Ex. PB after being duly sealed. The appellant-accused, along with case property, was produced before S.H.O., Police Station Sadar, Sirsa, who affixed his own seals on the case property including the samples. Statements of witnesses were recorded under section 161 of Code of Criminal procedure.

3. On completing the investigation, *challan* was presented against the accused. In compliance with the provisions of Section 207 Cr.P.C, copies of the *challan* were supplied to the accused free of cost. On finding a *prima facie* case against the accused, charge under Section 18 of the NDPS Act was framed to which they pleaded not guilty and claimed trial.

4. In order to prove its case, prosecution examined as many as six witnesses. All the incriminating evidence was put to the accused and their statements under Section 313 Cr.P.C. were recorded wherein they pleaded false implication. However, the accused did not lead any evidence in their defence.

5. After minutely scrutinizing the evidence led by the prosecution and going through the record of the case, the learned trial Court held the appellant guilty and sentenced him as discussed herein above while it acquitted the co-accused.

CONTENTIONS

Learned counsel for the appellant assails the impugned judgment on the ground that the learned trial Court has failed to appreciate that there is an



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inordinate delay of several weeks in sending the sample to the FSL which remains unexplained. Since the seal remained with the Investigating Officer of this case, there was every possibility of the sample having tampered with by police officials. Moreover, the two samples of 10 grams each were drawn from the contraband alleged to have been recovered from the possession of the appellant but in the laboratory, the weight of the sample was found to be 12.700 grams. This shows that the sample sent to the laboratory was not the same as the one which had allegedly been drawn at the spot.

7. Learned counsel further contends that no evidence has been supplied by the prosecution to prove that the sample impression of the seal was retained which was further supposed to be deposited with the Malkhana and with the MHC or which could be sent to the laboratory. On this ground alone, the appellant deserves to be acquitted. In support of this submission, reliance is placed upon ***Paramjit Singh vs. State of Punjab 1996(1) RCR (Criminal) 267***. Furthermore, the statement of the appellant under Section 313 Cr.P.C. had not been properly recorded and the link evidence was not put to him. Other incriminating material was also not put before the appellant to seek his explanation under Section 313 Cr.P.C. Thus a grave prejudice had been caused to the accused-appellant and on this ground alone, the appellant deserves to be acquitted. Finally, no independent witness was examined during trial and no cogent reason was given by the prosecution for not doing so.

OBSERVATIONS AND ANALYSIS

8. Having heard the parties at length and after perusing the record with their able assistance, it transpires that 520 grams of opium was recovered from the person of the appellant after he was nabbed by the police officials, who were on



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9. A perusal of the record indicates that the samples were deposited with the FSL, Madhuban after a delay of several weeks from the date of the seizure, which is in direct violation of the Standing Order No. 1 of 1988 dated 15.03.1988, which would tantamount to a serious flaw in the investigation and suffocate the prosecution case completely. The sanctity of the instructions contained in Standing Order No.1 of 1988 came up for consideration before the Hon'ble Supreme Court in **Noor Aga v. State of Punjab and another, 2008 (16) SCC 417** and it was held that these statutory instructions are mandatory in nature and the following was observed:

*“32. Recently, this Court in **State of Kerala & Ors. v. Kurian Abraham (P) Ltd. & Anr. [(2008) 3 SCC 582]**, following the earlier decision of this Court in **Union of India v. Azadi Bachao Andolan [(2004) 10 SCC 1]** held that statutory instructions are mandatory in nature.*

Logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly outed and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance of these guidelines by the investigating authority which leads to drawing of an adverse inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution.”

10. Furthermore, a perusal of the impugned judgment indicates that no independent witness was joined in the investigation when the recovery was effected from the accused. This lapse on the part of the investigation team becomes even more prominent, given the accused was apprehended from a public place. The Hon'ble Supreme Court in **Krishan Chand v. State of H.P. AIR 2017 (SC) 3751** has laid down the ratio that the failure of the investigating officer to associate an independent witness at the time of recovery creates a dent in the case of the prosecution. A two Judge Bench of the Hon'ble Supreme Court in **Gorakh Nath Prasad v. State of Bihar, 2018(1) RCR (Criminal) 108** had acquitted the accused

and held that the case of the prosecution cannot be entirely based upon the



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statements of the official witnesses when no independent witness has been joined in the investigation.

11. The Investigating Officer-ASI/SHO Kamal Singh (PW-5) is also the complainant of the case. The Hon'ble Supreme Court in *State by Inspector of Police, Narcotic Intelligence Bureau, Madurai, Tamil Nadu v. Ranjangam 2010(15) SCC 369*, has opined that since the arrest and search is made by the complainant, he should not involve himself with the investigation of the case. Such an officer leading the investigation would forthrightly raise questions as to the fairness and impartiality of the said investigation process.

CONCLUSION

14. In view of the above discussion, the present appeal is allowed. The judgment of conviction and order of sentence dated 04.09.2003 passed by learned Additional Sessions Judge, Sirsa is set aside. The appellant, namely Makhan Ram alias Kali, is acquitted of the charges framed against him. His bail bonds and surety bonds stand discharged.

15. Pending miscellaneous application(s), if any, shall also stand disposed of.

16. The case property, if any, may be dealt with as per rules after the expiry of period of limitation for filing the appeal(s). Record of the case be sent back to the Court below.

(HARPREET SINGH BRAR)
JUDGE

May 06, 2024
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Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No